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No. 188.

# In the Supreme Court of the United States.

THE BETHLEHEM STEEL COMPANY
*v.*
THE UNITED STATES.

REPLY BRIEF ON BEHALF OF THE UNITED STATES.

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Argument of appellee, to the effect that contract in suit is free from ambiguity, and parties therefore bound by it, and that "resort can not be had to the transactions which occurred while the contract was *in fieri* for the purpose of showing that they intended something different from the import of the language employed in the instrument," is misleading and fallacious.

If the expression "liquidated damages," were used in the contract instead of "penalties," would the appellee be necessarily concluded thereby? Certainly not.

Neither is the United States concluded by the use of the ill-omened expression "penalties."

The question of penalties, as contradistinguished from liquidated damages, has been a vexed and vexing one to the courts.

They have rarely refused to peer beneath the surface of things to ascertain the "reasonableness

of the transaction," particularly where, from the nature of the agreement, it is clear that any attempt to arrive at the actual damages would be difficult, if not impossible.

*Davis & Davidson* (17 C. Cls. R., 201).
*Gay Mfg. Co.* v. *Camp* (65 Fed. Rep., 794).

The authorities first cited in appellee's brief, if in point, are at hopeless variance with those cited in a later portion of the same paper. In its opening paragraphs cases are cited in support of strictness and literalness of interpretation, whereas the subsequent cases cited and relied upon are antagonistic to strict or narrow interpretation. Notably *Davis & Davidson* (17 C. Cls. R., 201); *Edgar Thompson Works* v. *United States* (34 C. Cls. R., 205); *Gay Mfg. Co.* v. *Camp* (65 Fed. Rep., 794).

The case of *Simpson et al.* v. *United States* (172 U. S., 372–379) (cited in appellee's brief at page 10) is not apposite.

That was a case where there was not the slightest trace of ambiguity in the contract. It was an agreement in writing with the United States to construct a dry dock at the Brooklyn Navy-Yard, according to plans and specifications, to be built upon a site that was available. No provision was made in regard to quicksands, should they come upon such in making the foundation. In executing the contract the contractors came upon shifting sands, by reason of which the work was made more difficult and vastly increased. Being unable to complete the contract within the time specified,

the contractors asked for an extension, which was given. On completion of the work settlement was had, and all moneys remaining due under the contract and some due for extra work were paid.

Some three years later claim for compensation for extra labor and materials, rendered necessary by the quicksands, was made, and, when it was refused, action to recover upon these claims was brought in the Court of Claims and there decided adversely to the claimant. Likewise this court, in passing upon the case, held: "That the contract imposed upon the contractors an obligation to construct the dock according to the specifications, within a designated time, for an agreed price, upon a site to be selected by the United States, and contained no statement or agreement, or even intimation, that any warranty, express or implied, in favor of the contractor was entered into by the United States concerning the character of the underlying soil;" and so the judgment of the court below was affirmed.

It is difficult to imagine two cases more diametrically dissimilar than the case cited and the case at bar.

In the Simpson case, the court very properly declined to re-form the contract, or write into the same clauses or conditions not contemplated by the parties thereto.

There being no ambiguity, either patent or latent, there was no call for interpretation.

The remaining cases cited in favor of strict

interpretation are equally inapplicable to the case under consideration.

In cases of this character a different rule obtains, and courts have rarely applied the doctrine of strict interpretation to penalty clauses appearing therein, except where the terms of the contract itself are so clear and unmistakable as to preclude the necessity of interpretation. In fact, it may be said that the doctrine of strict interpretation as applied to penalty clauses of contracts has been "more honored in its breach than in its observance," for the courts have seldom failed not only to scrutinize the agreement itself, but the transactions out of which the same grew, with great care, and not infrequently evidence *aliunde* of the contract has had determining force.

> *Davis & Davidson* v. *United States* (17 C. Cls. R., 201).
>
> See also cases cited, pp. 10–13, Government brief.
>
> *Tayloe* v. *Sandiford* (7 Wheat., 13–17; cited in appellee's brief, p. 14).
>
> *Edgar Thompson Works Co.* (34 C. Cls. R., 205).
>
> *Gay Mfg. Co.* v. *Camp* (65 Fed. Rep., 794–800).
>
> (The last two cases also cited by appellee.)

In the case of *Brawley* v. *United States* (96 U. S., 168–173—cited in appellee's brief, p. 11), in addition to the language quoted by appellee, and almost immediately following it, the court says:

> Previous and contemporaneous transactions may be all very properly taken into consideration to ascertain the subject-matter of a contract and the sense in which the parties may have used particular terms.

If the court hold, as it has frequently held, that the clauses providing for liquidated damages in specific terms are clauses providing for penalties, why not the reverse? This has been done repeatedly. (See cases cited in appellant's brief, pp. 10–12.)

Applying the doctrine announced by the court in the case of *Tayloe* v. *Sandiford* (*supra*) to the case under consideration, the appellant has unquestionably shown that the so-called penalties were considered as liquidated damages by the contracting parties and has furnished "very strong evidence" to show these facts. It is "no slight conjecture," but absolute certainty that the "parties were mistaken in the import of the terms they employed." In confirmation of this assertion, the court's attention is called to the antecedent and contemporaneous transactions, particularly to the advertisement, the proposals, and the correspondence that preceded the execution of the contract, which furnished the basis thereof and which explains the "sense in which the parties used particular terms."

These are a part of the record and are embraced in the findings of fact of the court below.

Some cases are cited by appellee wherein the

Court of Claims, it is believed by the appellant, has fallen into error in declaring per diem deductions to have been penalties. This applies to *Smith & Co.* v. *U. S.* (34 C. Cls. R., 472); also to *Halladay* v. *U. S.* (33 C. Cls. R., 453). It also applies even more emphatically to the case at bar, for here the rate of deduction was not forced upon the contractor, but was, in fact, proffered and tendered by the contractor to the United States in its own proposals.

The case of *Gay Mfg. Co.* v. *Camp* (65 Fed. Rep., 794–800) (cited in appellant's brief, pp. 18, 19) is exactly in point with the Government's contention as applied to the case at bar. In that case it was said:

> If, from the nature of the agreement, it is clear that any attempt to get at the actual damage would be difficult, if not vain, then the court will incline to give the relief which the parties have agreed to; but if, on the other hand, the contract is such that a strict construction of the phraseology would work absurdity or oppression, the use of the term "liquidated damages" will not prevent the court from inquiring into the actual injury sustained, and doing justice between the parties.

It is hard to imagine what aid or comfort the above authority lends to the contention of the contractor, for not only is it an authority against literalness of construction, holding, as it does, that the court will go outside of the phraseology which

oftentimes works "absurdity or oppression," but also "that if attempt to get at the actual damage would be difficult, if not vain, then the courts will incline to give the relief which the parties have agreed to."

This authority fits the case at bar like a death mask, since, from the nature of the agreement under consideration, it is clear that "any attempt to get at the actual damage would be difficult, if not vain. Indeed, it is not too much to say that to "get at the actual damage" which the Government would sustain by reason of the nondelivery of the carriages in question in one year, or ten years, or even a century, is a task beyond finite calculation.

If the court wishes to do equity, it should consider not merely disadvantage to the Government occasioned by the contractor's failure to deliver the carriages within the time contracted for, but the advantage that it would be to the contractor if he were able to prolong the period of construction.

A fundamental error has crept into the decisions of the courts in cases of this character, from the tendency to excuse the contractors for delays in deliveries where the Government is not shown to have suffered actual monetary damage or loss; whereas the court should scan the transaction on both sides, not overlooking the advantage that would accrue to the contractor, according to his own statement or admission, as in this case, that it was worth much less to make the carriages in a

longer period and much more to make them in a shorter period.

If it was worth less, as the court must believe from the terms of the contract in the sense in which the parties used them and intended them, to complete the carriages in a period of fourteen months than in a period of seven months, and if the appellee contracted on the basis of seven months and failed to deliver them within said period, but consumed fourteen months instead, and the contract itself, by a system and scale of per diem deductions based on the appellant's own proposals, fixed the price of delay to correspond to the difference in price of the carriages as embraced in the different proposals, why should not such a contract be enforced? In what respect is the same unconscionable and unfair?

In other words, the contractor is given the option of increased price for increased speed, and, conversely, decreased price for decreased speed, on the basis of his own proposals, to the effect that it costs more and is worth more to complete the work rapidly than slowly.

The contract was advertised, let, and drawn on a celerity basis, and its enforcement should be upon the same basis. The court need only apply the appellee's scale of prices for the carriages in question, based on time, to ascertain that appellee is now asking $21,000 and upward in excess of its own offer to construct and deliver said carriages in the time they were actually finished. Why should

the Government be required to pay more than the contractor represented it was worth to furnish, and offered to furnish, the carriages in question?

Such proposition is utterly destitute of merit. It is absolutely without justification, either in law, in equity, or in morals.

Its mere presentation carries with it irresistible argumentative force.

The case at bar is clearly distinguishable from many of the cases cited in appellee's brief, for time in the contract herein was as much of a moving consideration as the construction of the carriages themselves.

Both parties so regarded it, the Government's advertisement for bids emphasized it, the correspondence reemphasized it, and the contractor so understood it, considered it, and prepared and presented his proposals with this in mind, and the so-called penalty clause in the contract was inserted to cover this particular feature.

The damages were fixed, ascertained, evaluated, and stated by the contractor itself in the first instance in its own proposal, and were afterwards ingrafted and embodied in the contract itself.

This view of the case, and it is the only proper view, eliminates the punitive element entirely. The price having been fixed on an emergency basis, the settlement should be upon the same basis.

This case rests on a time basis—it is a time contract—not merely on Government's side, but on contractors.'

This per diem deduction, miscalled "penalty," was intended not only to measure and liquidate the damage sustained by the Government on the contractor's failure to deliver within the time called for, but the decreased cost of manufacture to the contractor if he nursed the job.

In this view, time was of the essence of the contract, and as controlling as any other element or consideration. Fairly stated, the question at issue is, therefore, price, not penalty.

The use of the expression "penalties" in connection with the phraseology of contracts is a well-nigh incurable departmental disorder—almost epidemic, in fact. It has been used repeatedly where liquidated damages were clearly intended, as herein.

Government is not bound by it, nor are the courts.

Numerous cases so hold.

The contractor avers that the Government has not met with any actual or definable monetary loss, because the foundations which were to receive the carriages were not ready for their reception at the time of the completion of the carriages themselves.

This is misleading and fallacious, for their complete installation was unnecessary. The fact that the Government did not have them, and, hence, could not install them should emergencies require, is sufficient.

We lacked just that much in war equipment and efficiency.

Moreover, even if the Government had been waiting to install them, in that event no actual or appreciable damage due to delay would be provable.

This is a contract which illustrates and demonstrates in a marked degree the necessity for the introduction of a liquidated damage clause to properly protect the interests of the United States.

The court below fell into grievous error in regard to the percentage problem, calling attention as they did in their opinion that it would amount to upward of 35 per cent of the contract price for one year.

Obviously the Court of Claims overlooked the fact that the deliveries were all made within the time limits of the contractor's own proposals, and settlements were made accordingly, after allowing the contractor for delays not properly chargeable to it.

Will the court make a better contract for the contractor than it made for itself?

Will the court say that the contractor did not understand the consequences of its own offer and agreement?

Was any pressure, duress, or undue influence used or anywhere present to induce the contractor to make this agreement?

None whatever.

It is conclusively demonstrated that the parties

were mistaken as to the import of the terms they employed; that is, in the use of the expression "penalties." It has been shown by the most indubitable proofs that this was a time contract, drawn with that end in view, and that the price of the carriages was fixed and determinable on a sliding scale, increasing as deliveries were hastened, decreasing as deliveries were delayed.

Is not such an agreement both conscionable and enforceable?

By what rule of law or principle of justice shall the Government be compelled to pay to the contractor $21,000 in excess of the amount which it represented it was worth, and offered to build and complete said carriages—in the face of the fact that the contractor has already been paid all that was agreed upon for the carriages on the basis of deliveries as made.

Upon the question of the authority and discretion vested by the contract in the Chief of Ordnance, the court's attention is directed to the case of *Guild* v. *Andrews* (137 Fed. Rep., 371) and the list of cases therein cited.

Respectfully submitted.

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